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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/633,207	08/01/2003	Robert J. Petcavich	937-1535	3285
7590	10/29/2008		EXAMINER	
NIXON & VANDERHYE P.C. 11th Floor 901 North Glebe Road Arlington, VA 22203-1808			CHAWLA, JYOTI	
			ART UNIT	PAPER NUMBER
			1794	
			MAIL DATE	DELIVERY MODE
			10/29/2008	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/633,207	PETCAVICH, ROBERT J.	
	<b>Examiner</b>	<b>Art Unit</b>	
	JYOTI CHAWLA	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 23 July 2008.

2a) This action is **FINAL**.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1,2,4-6 and 12 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1,2,4-6 and 12 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____ .
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>7/23/08</u> .	5) <input type="checkbox"/> Notice of Informal Patent Application
	6) <input type="checkbox"/> Other: _____ .

### **DETAILED ACTION**

Applicant's submission filed on July 23, 2008 has been entered. Claims 1-2, 4-6 and 12 remain pending and are examined in the application.

#### ***Specification***

New matter rejection to the amendment to the specification filed November 7, 2007 has been withdrawn based on the applicant's submission of documents supporting the chemical composition of Trademarks "Tergitol™" and "Triton-X™" at the time the invention was made and also based on applicants remarks dated July 23, 2008.

#### ***Claim Rejections - 35 USC § 112***

New matter rejections have been withdrawn in light of applicant's arguments dated July 23, 2008.

#### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

(A) Claims 1-2 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scott et al (US 2872325), in view of the combination of Nisperos Carriedo et al (US 5376391) and Liu (US 4710388).

The references and rejection are incorporated herein and as cited in the office action mailed January 25, 2008.

(B) Claims 4 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scott, in view of combination of Nisperos and Liu, as applied to claims 1-2 and 12 above, further in view of Yang et al (US 6165529).

The references and rejection are incorporated herein and as cited in the office action mailed January 25, 2008.

(C) Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Scott, in view of combination of Nisperos and Liu, as applied to claims 1-2 and 12 above, further in view of Bice et al (US 3674510).

The references and rejection are incorporated herein and as cited in the office action mailed January 25, 2008.

(D) Claims 1-2 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scott et al (US 2872325), in view of the combination of Lee (US 4729190).

The references and rejection are incorporated herein and as cited in the office action mailed January 25, 2008.

(E) Claims 4 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scott, in view of combination of Lee, as applied to claims 1-2 and 12 above, further in view of Yang et al (US 6165529).

The references and rejection are incorporated herein and as cited in the office action mailed January 25, 2008.

(F) Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Scott, in view of Lee, as applied to claims 1-2 and 12 above, further in view of Bice et al (US 3674510).

The references and rejection are incorporated herein and as cited in the office action mailed January 25, 2008.

### ***Response to Arguments***

Applicant's arguments filed July 23, 2008, with respect to claims 1-2, 4-6 and 12 have been fully considered but have not been found persuasive.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Regarding the applicability of the individual references, the applicant is referred to the rejection in the previous office action.

Applicant's argument that the reference can not be combined as Scott teaches of anionic references and the invention as claimed recites a non-ionic invention (Page 3, paragraph 3 of remarks). However, the applicant quotes the statement from Scott that "...best results are obtained by using surface active agents of the anionic classification" (Column 2, lines 43-45 of Scott and page 3 of applicant's arguments), however, Scott does not preclude use other emulsifiers. Further Nisperos teaches food coating composition with Polysorbate as one of the surface-active agents or emulsifiers used in the composition (Column 3, line 64 to Column 4, line 5), which is a non-ionic surfactant. Nisperos also teaches of lecithin as an emulsifier (Column 4, lines 1-15), which is not a non-ionic emulsifier. Thus, emulsifiers of ionic and non-ionic nature have been used as functional equivalents in coating compositions for food and were known in the art at the time of the invention. Also Liu teaches of a coating composition for pineapple crowns, i.e., fruits, wherein the emulsifier used in the protective coating composition includes Triton<sup>TM</sup>-X and polysorbate under the name Tween<sup>TM</sup> (Column 3, line 67 to Column 4, line 2). Thus, non-ionic as well as anionic emulsifiers including Triton<sup>TM</sup>-X and Tween<sup>TM</sup> and lecithin were used as surfactants or emulsifiers in the art of food coating at the time of the invention. Further, Triton<sup>TM</sup>-X and Tween<sup>TM</sup> were known functional equivalents in the art. Therefore, one of ordinary skill at the time of the invention would have been motivated to modify the surfactant taught by Scott and use another surfactant, such as, Polysorbate 80 (as taught by Nisperos) or Tween<sup>TM</sup> or Triton<sup>TM</sup>-X (as taught by Liu), in order to have an emulsifier that is highly water soluble to make an suitable coating composition that can be applied to fruits as an aqueous suspension. It would have been

further obvious to one of ordinary skill in the art at the time the invention was made to substitute one art recognized functional equivalent (i.e., Triton™-X ) for another (i.e. Tween™ or polysorbate 80) in the coating composition as disclosed by Nisperos or Liu, depending on which of the emulsifying agent was more easily available and more affordable at the time the invention was made. One of ordinary skill would have been further motivated to do so in order to have an emulsifier or stabilizer that is non-toxic and edible and thus is safe to be added to foods. Furthermore, In response to applicant's argument that the emulsifiers or surfactants can not be substituted based on Nisperos or Liu's teachings, the applicant is reminded that the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Thus, applicant's argument has been fully considered, but has not been found persuasive and claims 1, 2, 4-6 and 12 remain rejected for reasons of record, absent any clear and convincing evidence and or arguments to the contrary.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JC  
Examiner  
Art Unit 1794

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794